No. 14-1209

In The Supreme Court of the United States

JOHN STURGEON,

Petitioner,

v.

BERT FROST, IN HIS OFFICIAL CAPACITY AS ALASKA REGIONAL DIRECTOR OF THE NATIONAL PARK SERVICE, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* SOUTHEASTERN LEGAL FOUNDATION SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether Section 103(c) of the Alaska National Interest Lands Conservation Act of 1980 prohibits the National Park Service from exercising regulatory control over State, Native Corporation, and private Alaska land physically located within the boundaries of the National Park System.

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INTEREST OF *AMICUS CURIAE*[1]

Southeastern Legal Foundation (SLF), founded in 1976, is a national non-profit, public interest law firm and policy center that advocates constitutional individual liberties, limited government, and free enterprise in the courts of law and public opinion. SLF drafts legislative models, educates the public on key policy issues, and litigates regularly before the Supreme Court, including such cases as *Utility Air Regulation Group, et al. v. EPA*, 134 S. Ct. 2427 (2014).

This case is of particular interest to SLF because the National Park Service's claim of extraterritorial jurisdiction is yet another example of the Executive Branch's unconstitutional usurpation of power through creation of an expansive administrative state. Over the last decade, the administrative state has grown in two primary ways – through the launching of new agencies and through the expansion of existing agencies' jurisdiction. While both means of growth offend the founding principles of limited government and enumerated powers, the latter is of prime concern because expansion of administrative jurisdiction

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[1] All parties have consented to the filing of this brief in letters on file with the Clerk of Court, and the parties were notified of *amicus curiae's* intention to file this brief. *See* Sup. Ct. R. 37.3(a). No counsel for a party has authored this brief in whole or in part, and no person other than *amicus curiae*, their members, and their counsel has made monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6.

raises serious constitutional concerns. *Amicus* writes separately because the National Park Service's overreach and claim to full regulatory authority over non-federal land and waters within national parks and preserves in Alaska violates the Property and Commerce Clauses of the Constitution.

SUMMARY OF ARGUMENT

"The administrative state wields vast power and touches almost every aspect of daily life." *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1878 (2013) (Roberts, C.J., dissenting) (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010)). "[T]he authority administrative agencies now hold over our economic, social, and political activities" *id.*, stands in stark contrast to the government of enumerated powers the Framers envisioned. Our Founding Fathers sought to create a government structure limited in nature – as James Madison explained in an effort to ease concerns that the proposed national government would usurp the People's power to govern themselves: "The powers delegated by the proposed Constitution to the federal government are few and defined . . . [and] will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce. . . ." The Federalist No. 45 (James Madison), at 292 (Clinton Rossiter ed., 1961). Today's wide-reaching "'administrative state with its reams of regulations would leave [the Founders] rubbing their eyes.'" *City of Arlington*, 133 S. Ct.

at 1878 (quoting *Alden v. Maine*, 527 U.S. 706, 807 (1999) (Souter, J., dissenting)). "It would be a bit much to describe the result as the very definition of tyranny, but the danger posed by the growing power of the administrative state cannot be dismissed." *Id.* at 1879 (citation and quotation omitted).

This case involves a straightforward question of statutory interpretation and should be decided as such. However, *amicus* files this brief because the National Park Service's overreach raises serious constitutional concerns. The National Park Service's exercise of authority must be consistent with both the Property and Commerce Clauses of the Constitution. The Constitution vests the Legislative Branch, not the Executive Branch, with the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes[,]" U.S. Const. Art. I, Sec. 8, cl. 3, and "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States[,]" U.S. Const. Art. IV, Sec. 3, cl. 2.

Congress has neither demanded for itself federal regulatory control over the millions of acres of Alaskan land at issue in this case, nor has it granted the National Park Service *any* authority under the Commerce Clause or the Property Clause to regulate these waters. Congress has however, spoken through Section 103(c) of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. § 3103(c), to explicitly deny jurisdiction to the National Park Service to regulate non-federally owned lands and

waters within units of the National Park System of Alaska. Ignoring the plain text of the Constitution and absence of the requisite enabling legislation, the National Park Service's claim of extraterritorial jurisdiction violates the Property and Commerce Clauses. Similarly, any attempt by the National Park Service to rely on the Commerce and Property Clauses simply because they authorize a branch of the federal, and not state, government to enact laws related to our Country's navigable waters, results in a gross misreading of the Constitution. These flawed readings disregard the Constitution's inherent separation of powers.

The National Park Service's abuse of the limited regulatory powers Congress granted it and assertion of unsupported expansive authority are prime examples of the growing tyranny the Founding Fathers fought against. Because the Ninth Circuit's decision granting the National Park Service plenary authority to impose all nationwide regulations in Alaska violates the Constitution, this Court should reverse the Ninth Circuit's decision.

ARGUMENT

I. Congress declined to grant the National Park Service authority under the Property Clause to regulate non-federal lands and waters in Alaska's national parks and preserves.

The Property Clause grants Congress the power "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States[,]" U.S. Const. Art. IV, Sec. 3, cl. 2. "[W]hile courts must eventually pass upon them, determinations under the Property Clause are entrusted primarily to the judgment of Congress." *Kleppe v. New Mexico*, 426 U.S. 529, 536 (1976). As such, administrative agencies can only exercise jurisdiction under the Property Clause when Congress authorizes such extraterritorial jurisdiction through specific enabling legislation.

In applying these principles, the lower courts have found that a general grant of authority over federal resources does not constitute a delegation of "specific authority to regulate non-federal property." *See Stewart v. United States*, 639 F. Supp. 2d 1190, 1201 (D. Or. 2009) (finding the United States Forest Service abused its discretion in presuming the lake at issue was non-navigable and relying only on statutes that generally authorize management of federal forests to expand its regulatory jurisdiction to prohibit the use of floatplanes and internal combustion motors on the lake). Where Congress has intended for an administrative agency to exercise such jurisdiction,

it has specifically provided for it. *See, e.g., United States v. Lindsey*, 595 F.2d 5, 6 n.1 (9th Cir. 1979) (per curium) (finding the Secretary of Agriculture had the authority to protect against the destruction of national forests by fire and other degradation only because in 16 U.S.C. §§ 551 and 1271 Congress "authorize[d] promulgation of regulations applicable to activities occurring in a national forest" and to acts that affect, threaten or endanger federal property administered by the Forest Service); *see also United States v. Hells Canyon Guide Serv.*, 660 F.2d 735, 737-38 (9th Cir. 1981) (finding the Secretary of Agriculture had the authority to regulate the use and occupancy of components of privately owned property within the Hells Canyon Recreation Area because Congress specifically granted it such authority in 16 U.S.C. §§ 551, 1281(d)).

No such enabling legislation exists here. The National Park Service would have this Court read Congress's specific invocation of its Property Clause authority in Title VIII of ANILCA to be a general grant of authority to the Secretary of Interior in administering the entirety of ANILCA.[2] However,

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[2] Section 801 of ANILCA provides:

> [I]t is necessary for the Congress to invoke its constitutional authority under the property clause and the commerce clause to protect and provide the opportunity for continued subsistence uses on the public lands by Native and non-Native rural residents[.]

16 U.S.C. § 3111(4).

Congress did not write the statute that way and went to great lengths to make clear its intent to deny jurisdiction over non-federally owned lands and waters within units of the National Park System of Alaska to the National Park Service. Importantly, Title I of ANILCA, of which Section 103(c)[3] is a part, establishes the purposes and definitions applicable to the entire statute, and includes no explicit general delegation of Congress's Property Clause authority to the executive branch agencies administering the statute.

Instead, through Section 103(c), Congress expressly refused to delegate its Property Clause power over non-federal land and waters within the national parks and preserves in Alaska. 16 U.S.C. § 3103(c). In adding Section 103(c), Congress "ma[d]e clear beyond any doubt that any State, Native, or private lands, which may lie within the outer boundaries of the

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[3] Section 103(c) of ANILCA provides:

> Only those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act) shall be deemed to be included as a portion of such unit. No lands which, before, on, or after December 2, 1980, are conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands within such units. If the State, a Native Corporation, or other owner desires to convey any such lands, the Secretary may acquire such lands in accordance with applicable law (including this Act), and any such lands shall become part of the unit, and be administered accordingly.

16 U.S.C. § 3103(c).

conservation system unit are not parts of that unit and are not subject to regulations which are applied to public lands, which, in fact, are part of the unit." 125 Cong. Rec. 11,158 (1979) (statement of Rep. Seiberling). Thus preventing the National Park Service from exercising extraterritorial jurisdiction over the lands and waters at issue in this case.

Even if the mere reference to the Property Clause in Title VIII could be construed as enabling the National Park Service to unilaterally claim jurisdiction over the non-federal land and parks at issue here, the National Park Service's exercise of that power is unconstitutional because it exceeds the powers granted to Congress under the Property Clause. Justification of extraterritorial regulation based in the Property Clause requires a showing that activities on state-owned waters sufficiently impact National Park Service controlled lands or resources. *See Minnesota by Alexander v. Block*, 660 F.2d 1240, 1249 (8th Cir. 1981) (noting that under the Property Clause, Congress's power extends "to regulation of conduct on or off the public land that would threaten the designated purpose of federal lands"). This authority allows the National Park Service to enforce only specific targeted regulations on non-federal lands to protect federal lands. *See, e.g., United States v. Alford*, 274 U.S. 264, 267 (1927) (finding the purpose of the statute was to prevent forest fires which imperil adjacent federal lands). The National Park Service has not and cannot establish that hovercraft "imperil" adjacent federal lands.

Because the National Park Service's exercise of extraterritorial jurisdiction over the lands and waters at issue here violates the Property Clause of the Constitution, the Ninth Circuit's decision should be reversed.

II. Congress declined to grant the National Park Service authority under the Commerce Clause to regulate non-federal lands and waters in Alaska's national parks and preserves.

The Commerce Clause grants Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. Art. I, Sec. 8, cl. 3. Based on this power, Congress may exercise jurisdiction over "those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce." *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 281 (1981) (internal citations omitted).

"After a State enters the Union, title to the land is governed by state law." *Montana v. United States*, 450 U.S. 544, 551 (1981). Alaska thus owns the "shores of navigable waters, and the soils under them[.]" *John v. United States*, 720 F.3d 1214, 1224 (9th Cir. 2013). "The State's power over the beds of navigable

waters remains subject to only one limitation: the paramount power of the United States to ensure that such waters remain free to interstate and foreign commerce." *Montana*, 450 U.S. at 551. Thus, through the Commerce Clause, Congress is permitted by the Constitution to regulate certain activities occurring on navigable waters. The constitutional grant of power to the Legislative Branch does not, in any way, give the Executive Branch authority to exercise extra-territorial jurisdiction over navigable waters. Authority over navigable waters can arise only out of an explicit delegation from Congress and requires a showing that the regulated activities on State-owned waters sufficiently impact lands or resources controlled by the National Park Service.

Just like it did with respect to its authority under the Property Clause, in enacting Section 103(c) of ANILCA, Congress explicitly stated its intent to not invoke its Commerce Clause authority and to not delegate its constitutional grant of authority to regulate the non-federal waters within national parks and preserves in Alaska. *See* 16 U.S.C. § 3103(c); *see also Alaska v. Babbitt*, 72 F.3d 698, 703 (9th Cir. 1995) (expressly holding that "[n]either the language nor the legislative history of ANILCA suggests that Congress intended to exercise its Commerce Clause powers over submerged lands and navigable Alaska waters"). The fact that Congress specifically invoked its Commerce Clause power in enacting Title VIII of ANILCA and failed to do so in enacting Title I indicates that Congress did not delegate its commerce

powers to the National Park Service. Any reliance by the Executive Branch on the Commerce Clause to justify its abrogation of the plain language of Section 103(c) is both misplaced and contrary to the text.

Congress similarly declined to grant the National Park Service extraterritorial jurisdiction under the Commerce Clause when it enacted the 1976 Park Service Administration and Improvement Act. To be clear, the Park Service Administration and Improvement Act does authorize the National Park Service to adopt and enforce regulations concerning boating and related activities but it explicitly limited that authority to the scope already granted to the United States Coast Guard. 16 U.S.C. § 1a-2(h).[4]

The legislative history supports a limited reading that authorizes the National Park Service to regulate only those boating and related activities already subject

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[4] The 1976 Park Service Administration and Improvement Act, grants the Secretary of Interior the authority to

> [p]romulgate and enforce regulations concerning boating and other activities on or relating to waters located within areas of the National Park System, including waters subject to the jurisdiction of the United States: Provided, That any regulations adopted pursuant to this subsection shall be complementary to, and not in derogation of, the authority of the United States Coast Guard to regulate the use of waters subject to the jurisdiction of the United States.

16 U.S.C. § 1a-2h. This code section was later repealed and recodified by the Act of Dec. 19, 2014, Pub. L. 113-287, § 7, 128 Stat. 3094, 3273 (2014). *See* 54 U.S.C. § 100751.

to United States Coast Guard regulation. Specifically, the House Report that accompanied the final bill states:

> A clarification of the ability of the Secretary to promulgate boating activities [sic] is included, thus ensuring that this expanding use within our national parks can be specifically controlled. The Committee amendment ensures that any exercise of this regulatory authority will not be in derogation of the regulatory powers of the U.S. Coast Guard.

H.R. Rep. No. 94-1569, at 6 (1976), *as reprinted* 1976 U.S.C.C.A.N. 4290, 4291-92. The section-by-section analysis explicitly states that the National Park Service's authority to regulate boating and related uses "would be accomplished as a supplement to, and not in conflict with, any Coast Guard regulations and enforcement." *Id.* at 4292.

The Department of Interior report on the bill takes this a step further, admitting that in enacting the 1976 Park Service Administration and Improvement Act Congress did not intend to delegate its Commerce Clause power to regulate all navigable waters to the National Park Service: "In effect, Congress would be clarifying its intent to invoke its powers under the Commerce Clause of the Constitution to regulate boating and other activities to assist in the administration of the Park System." *Id.* at 4298.

In enacting the 1976 Act, Congress was respectful of the traditional state authority to manage navigable waterways and mindful to fully preserve the equal footing and public trust doctrines. Four years later, in enacting ANILCA, Congress reinforced the limitations of its delegation of commerce powers to the National Park Service's over navigable waters. Both pieces of legislation support finding that in claiming jurisdiction over non-federal lands and waters in Alaska's national parks and preserves, the National Park Service violates the Commerce Clause of the Constitution. Neither statute provides the sweeping power the National Park Service has usurped as its own. Because the National Park Service's exercise of extraterritorial jurisdiction over the non-federal lands and waters at issue here violates the Commerce Clause of the Constitution, this Court should reverse the Ninth Circuit's decision.

CONCLUSION

For the foregoing reasons, and those stated by Petitioner, John Sturgeon, Southeastern Legal Foundation respectfully requests that this Court reverse the decision below.

Respectfully submitted,

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